SPEECH

OF

HON. REVERDY JOHNSON,

OF MARYLAND,

ON

ORGANIZATION OF PROVISIONAL GOVERNMENTS WITHIN THE STATES WHOSE PEOPLE WERE LATELY IN REBELLION AGAINST THE UNITED STATES;

DELIVERED

IN THE SENATE OF THE UNITED STATES, JANUARY 11, 1866.

WASHINGTON:
PRINTED AT THE CONGRESSIONAL GLOBE OFFICE.
1866.

SPEECH.

The Senate having under consideration the joint resolution (S. R. No. 11) in relation to the organization of provisional governments within the States whose people were lately in rebellion against the United States—

Mr. JOHNSON said:

Mr. PRESIDENT: In the remarks which I propose to submit to the Senate, it is my purpose to consider almost exclusively the question as to the actual condition of the States in which insurrections have heretofore existed; and I take occasion to do it now because I differ materially from the honorable member from Wisconsin, [Mr. HOWE,] who spoke so well yesterday in maintaining an opinion opposite to my own, from a desire that that opinion, supported as it was in a very carefully prepared and very able speech, should not be permitted to go to the country a day without an effort at a reply. I feel no reluctance in speaking upon the particular question now because I happen to be a member of the committee of fifteen, because the opinion which I am about to state and to uphold is one which I have entertained from the beginning; not only from the beginning of our recent troubles, but from the earliest period at which I can recollect I had any opinion at all upon the meaning of the Constitution in the particular involved.

I understand the honorable member from Wisconsin to maintain that the effect of the hostilities which we have been carrying on to suppress the insurrection in certain of the States where it has prevailed for some four years is to extinguish altogether the States as such, and to reduce the territory of which those States were composed at the time when the insurrection broke out to the condition of Territories, and to subject the people of those States to be governed under that clause of the Constitution which gives to Congress the power to govern the Territories, or upon the ground that they have been conquered by the United States, and that the power to govern is to be implied from the right of conquest when the conquest is completed.

Mr. HOWE. If the honorable Senator is simply stating what he understands to be the effect of my argument, I cannot object to it; but if he understood me to say that the purpose for which we prosecuted this war was to extinguish those States, he misunderstood me.

Mr. JOHNSON. I have not so stated. I did not understand the honorable member as saying that the purpose for which the war was prosecuted, but that the result of the prosecution of the war, was to reduce those States to the condition of Territories. It is to that proposition——

Mr. HOWE. If the honorable Senator will pardon me for one moment, my position was not that the result of the prosecution of the war was to reduce those States to Territories, but that they assumed the legal character of Territories by reason of their own acts, independent of the war. They destroyed the State organizations, not we.

Mr. JOHNSON. I so understood you.

Mr. HOWE. And the effect of the war was simply to reduce them to obedience to the United States, to be governed by such instrumentalities as the Constitution has provided.

Mr. JOHNSON. I am sure I have not misapprehended the Senator. It would have been very difficult for anybody to misapprehend him, for he was exceedingly lucid in everything he said. It may be possible that I may fail to explain what I understand to have been his propositions, and if I should do so in any part of the remarks which I am about to make, I hope the honorable Senator will set me right.

Mr. President, I propose first to inquire, what is the effect of the war itself? Is its successful result to reduce the States to the condition of Territories? I shall then inquire, if that is not

its effect, whether that has been produced by any conduct upon the part of the citizens residing within the limits of those States? No member of the Senate, I am sure, is now to learn that there is no power in the Constitution of the United States given to Congress, or any other department of the Government, to declare, or to carry on, a war against any State. The power to declare war, devolved upon Congress by the eighth section of the first article, is a power evidently looking to a war between the United States and a foreign nation. The authority, too, to protect the United States, or a State, by arms against invasion is a power given to Congress for protection against foreign invasion. If there could be any doubt, looking to the character of the Government, that such is the limitation of the war power, that doubt would be removed by the fact that there is in another part of the same section a provision which looks to the carrying on of such a contest as the one in which we have just been engaged. The language of that clause of the section succeeding the one which gives to Congress the authority to declare war, to raise and support armies, and to maintain and equip a navy, is:

"To provide for calling forth the militia to execute the laws of the United States, suppress insurrection," &c.

It was not, therefore, by means of the war power conferred upon Congress by the antecedent clause, giving to Congress the authority to declare war and vesting it with the means adequate to the end designed, that domestic outbreaks among ourselves were to be suppressed. The Convention looked to two contingencies as likely to happen: first, that we might be involved in war with foreign nations; secondly, that we might be involved in domestic troubles. For the one, they conferred upon Congress the war power, strictly speaking; and for the other, the authority to suppress insurrections, not by means of the war power, but by means of force. It was a police power given to Congress as such; not a power under which, by any possible mode in which it could be exercised, any conquest, in the proper sense of that term, was to be achieved; not a power by which there was to be extinguished any existing institution in any one of the States; and, above all, not a power to destroy a State or States.

You will remember, Mr. President, and every member of the Senate who is familiar with the proceedings of the Convention will, I have no doubt, remember, that when it was suggested that Congress should have the authority to make war against a State, the proposition was repudiated as fatal to the Government by two leaders of that body of mighty men, Hamilton and Madison. I have not time to state their reasons, nor to refer to the debates where they are to be found. It is sufficient for my purpose to say that they both denied that, as far as the Convention had proceeded at that time, any such authority was given to Congress, and protested against the propriety of conferring any such power, and it was never conferred.

The power actually given was a power to preserve, not to destroy; a power to maintain, not to extinguish; a power to make the Government what the preamble to the Constitution states to be the purpose of its framers, perpetual; a Government for the security of liberty for themselves and their posterity forever. It would have been an extraordinary anomaly, one that would justly have deprived its authors of the reputation that they now hold in the eyes of the civilized world, if, in forming a Government they designed to be perpetual, they had given it a power to destroy itself. The purpose, then, of the war power, strictly speaking, and of the police power conferred upon Congress by that clause in the eighth section of the first article, was to preserve, and not to destroy; to preserve it if assailed by a foreign foe; to preserve it if assailed by domestic treason or violence.

The proposition is so clear that I should not have deemed it necessary to cite authorities for the purpose of proving it, but that perhaps the observations of the honorable member from Wisconsin may induce some of the Senate, or induce the public, to suppose that there is in the Constitution an authority to carry on a war against a State. The question has been before the Supreme Court of the United States in the cases the opinion in which has been very much relied upon as maintaining in part the doctrine for which the honorable member contends; I mean the prize cases. Mr. Justice Grier, in delivering the opinion of the court in these cases, uses this language:

"By the Constitution Congress alone has the power to declare a national or foreign war. It cannot declare war against a State, or any number of States, by virtue of any clause in the Constitution. The Constitution confers on the President the whole executive power. He is bound to take care that the laws be faithfully executed. He is Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States. He has no power to initiate or declare war either against a foreign nation or a domestic State. But by the acts of Congress of February 28, 1795, and of March 3, 1807, he is authorized to call out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government of a State or of the United States."

Here, then, is an express denial of the power, either upon the part of Congress, or upon the part of the Executive, to carry on a war against a State, under any clause of the Constitution. The language is plain and positive. "It cannot," says the court—that is Congress cannot—"declare war against a State or any number of States, by virtue of any clause in the

Constitution." And the same doctrine is held by the minority in the opinion delivered by Mr. Justice Nelson. He says:

"The acts of 1795 and 1807 did not, and could not, under the Constitution, confer on the President the power of declaring war against a State of this Union."

We have, then, the unanimous opinion of the Supreme Court that domestic troubles, insurrection, a refusal to obey the Constitution or laws of the United States, or to execute the laws, or to interpose obstacles against the execution of the laws, do not authorize Congress to declare war against the State in which such insurrection may exist, is not a condition of things in which the President has any power to carry on a war by virtue of the war power for the purpose of reinstating the authority of the Government, but, on the contrary, is a state of things to be remedied by means of the police power, which Congress may authorize the use of by empowering the President to call out the militia, or use the Army and Navy of the United States to suppress an existing insurrection when it can be suppressed in no other way.

It would seem, therefore, to follow that when the insurrection is suppressed, when the contingency which requires a resort to the police power is at an end, the continuing use of that power, only conferred to suppress an insurrection, to carry on a war against a State in which there is no insurrection, is a simple absurdity. The design of the authority was to provide exclusively for the exigency, to meet which was the declared object of vesting the power in Congress to suppress insurrection. If the authority of the Government is set at defiance, if the laws cannot be executed by civil process, it is made the duty of Congress to provide other means by which it can be accomplished. It is their province, therefore, to put the President in possession of such means. But there is no more right to exert by force the police power after the insurrection is suppressed than there is to exert it before the insurrection commenced.

Mr. President, if I am right in this—and I do not think I can be mistaken—and there are no other grounds on which the proposition of the honorable gentleman from Wisconsin might be controverted, it is found to be repudiated by the positive provisions of the Constitution and by the decision of the Supreme Court.

But it is said that although there was no authority to carry on hostilities for the purpose of exterminating the States in which insurrection prevailed, that although that result would not have been attained by the use of force alone, yet that the conduct of the citizens of those States has attained it, and that the States as such are at an end. At an end how? At an end why? At an end because they decided to secede and attempted it? At an end because we have acquired rights over them by conquest which we had not when the rebellion began? Now a word as to the first ground.

The States ceased to exist by virtue of the conduct of their own citizens, is the argument. What conduct, and when had it that effect? They passed ordinances of secession. Were these valid? Had they any legal operation whatever? Did they take the States whose people had passed such ordinances out of the Union? Did they dissolve the connection to any extent which existed as between those States and the Union by force of the Constitution? If they did, it can only be because the ordinances were valid. The States are out, says the honorable Senator from Wisconsin, because their people determined that they should go out; they are out, because they were so far disloyal as to declare by ordinance that they were out; they are out because they are still disloyal, although the insurrection has been in fact suppressed and the authority of the Government reinstated. Well, if they are, why is that the result? If the ordinances were void, they could not take them out. If the citizens had not a right to be disloyal, their disloyalty could not put them out. If, notwithstanding the ordinances, on the day after they were passed the States were as much in the Union as on the day before they were passed, and if, after the ordinances were adopted and hostilities were being carried on, their citizens had no more right to be disloyal than they had before hostilities commenced, then they are just as much in the Union now as they were before.

Will any member of the Senate seriously maintain, or maintain at all, that the ordinance of secession had any validity whatever? If any member does so hold, the war upon our part has been a great crime; we have been traitors to the obligations we are under to the Constitution, and not those who, exercising the right of secession, have separated themselves from us. But if, as we all hold, and now everybody thinks, the Constitution confers no right of separation, but imposes an obligation upon every citizen in every State, no matter what may be his conduct or the conduct of all his fellow-citizens, as absolute as it does upon every citizen in any other State, then the ordinances of secession were simply void, absolutely void, having no more effect to terminate the connection between those States and the people of those States and the Government of the Union, than if such ordinances had been passed by any people outside of the limits of the United States; and my friend from Wisconsin must admit this view to be correct.

If the ordinances of secession then had no operation, but were legal nullities, how is it that separation is effected by the conduct of the individual citizens? Is not every man who has been engaged in the insurrection, and who has attempted to maintain it by force of arms, a traitor, if we look merely to the language of the Constitution in its definition of treason? Can anybody doubt that? Whether he may be prosecuted for

treason now, under the circumstances which have occurred since hostilities commenced, is a grave question which I do not propose to discuss or to express an opinion upon at this time. But, regarding only the single fact that he has been a party to the insurrection and has endeavored to aid and support it by force of arms, I apprehend there is not a member of the Senate who will for a moment question the right of the Government to prosecute him for treason, and that that right is not dependent upon the time at which he may have attempted by force of arms to resist the authority of the Government. If done an hour before hostilities terminated by the surrender of the insurgents, he is just as much a traitor, in the eye of the Constitution, looking alone to the fact that he was so engaged, as he was a traitor who, in the origin of the rebellion, supported it by force of arms. And if this be so, why is it so? Only because he was then, and is still, a citizen of the United States, bound by the Constitution of the United States, under the obligation of the laws of the United States, and because what he has done has been an act violative of the obligations of both, and an act subjecting himself to the consequences of that violation, just as absolutely as my honorable friend (if he will permit me to suppose such a thing possible) would be if he, in his State of Wisconsin, was found in arms resisting the rightful authority of the United States.

Unless I am greatly mistaken this result cannot depend on whether a few or many are in the insurrection. It is insurrection still in the view of the Constitution, and being insurrection attempted to be maintained by force of arms, it is treason, and treason only because, like ourselves who have been here during the whole of the contest, faithful to our allegiance, these erring, misguided men were citizens of the United States, and responsible to all the obligations imposed upon citizens of the United States by the Constitution and laws passed under its authority.

What would be the consequence of the opposite doctrine—I do not mean to say that the honorable member from Wisconsin goes to that extent—but what would be the logical result of the opposite doctrine? The States, according to that doctrine, are out; as such they have ceased to exist; they are not to be recognized by the Constitution at all; they are as absolutely without the Constitution as States as any of the unorganized territories of the United States. If this be so, if this is the effect of what has happened, how are you to get them in? The honorable member goes to the length which I am about to state, if I correctly apprehended him, as I certainly endeavored to do. You are, he contends, to get them in again only by subjecting them first to a territorial government. What does that admit? That they are under no obligation as citizens of a State to obey the Constitution and laws of the United States, that they are under no obligation to take any part in the election of the Executive, in the election of Senators, in the election of members of the House of Representatives. What follows from this? Does this enforce the Constitution and laws? Is this the only manner in which the authority of the Government is to be reinstated? The offense of these citizens was a refusal to participate in the councils of the nation. The proposition is that that very refusal has put them in a condition in which they have no right to participate in such councils, and cannot participate unless we hereafter, at any time when in our judgment we may think proper, give them that right.

Let us see what is to become in the mean time of our laws in other respects. How is your revenue to be collected by any laws now in force? If you impose a direct tax, how is that to be apportioned by any law now in force? The language of the Constitution is that direct taxes are to be apportioned among the States in a certain proportion. Have you not done it pending the insurrection? You passed an act in 1861, from which I am about to read. It was passed on the 5th of August, the rebellion having commenced in April preceding. I rather think my friend to whom I am replying voted for this law. Certainly I can find nothing in the proceedings of the Senate to show that he or any other Senator opposed it; he will correct me if I am wrong. When this law was passed, the result of the conflict, in the apprehension of some, was exceedingly doubtful; those of us who were most confident were somewhat apprehensive. All the conduct of the States or citizens upon which the honorable member now relies for the purpose of showing that these States ceased to exist and are now Territories, they and their citizens, to be governed accordingly, had then occurred. What is the law passed, I believe, by a unanimous vote of this body, and, as far as I know, with like unanimity in the House? It is entitled "An act to provide increased revenue from imports, to pay interest on the public debt, and for other purposes." Its every section bears upon the question I am discussing, but I have not time to read the whole. I refer particularly to the eighth section, which provides:

"That a direct tax of $20,000,000 be, and is hereby, annually laid upon the United States, and the same shall be, and is hereby, apportioned to the States, respectively, in manner following."

And then it proceeds to state the amount apportioned to each State, and among these items are these:

"To the *State* of Virginia, nine hundred and thirty-seven thousand five hundred and fifty and two third dollars.

"To the *State* of North Carolina, five hundred and seventy-six thousand one hundred and ninety-four and two third dollars.

"To the *State* of South Carolina, three hundred and sixty-three thousand five hundred and seventy and two third dollars.

"To the *State* of Georgia, five hundred and eighty-four thousand three hundred and sixty seven and one third dollars.

"To the *State* of Alabama, five hundred and twenty-nine thousand three hundred and thirteen and one third dollars.

"To the *State* of Mississippi, four hundred and thirteen thousand eighty-four and two third dollars.

"To the *State* of Louisiana, three hundred and eighty-five thousand eight hundred and eighty-six and two third dollars.

"To the *State* of Tennessee, six hundred and sixty-nine thousand four hundred and ninety eight dollars.

"To the *State* of Arkansas, two hundred and sixty-one thousand eight hundred and eighty-six dollars.

"To the *State* of Florida, seventy-seven thousand five hundred and twenty-two and two third dollars.

"To the *State* of Texas, three hundred and fifty-five thousand one hundred and six and two third dollars."

Making an aggregate of between five and six million dollars as the proportions of these States of the $20,000,000 which you proposed to raise by this law. Look to the Constitution of the United States and you find that you had no authority to make that apportionment except upon the theory that these States were then States of the Union. The honorable member tells us now that Virginia is out, and that each of the other named States are out, and have no existence. If she and the rest of them do not exist now they had no existence then; and on the other hand, if they were within the Union then, they are for the same reason within the Union now. After the law passed it was found somewhat difficult to enforce the collection of that portion of the $20,000,000 allotted to States actually in rebellion, and Congress deemed it necessary to pass a supplementary act, to which I also invite the attention of the Senate. It is the act of June 7, 1862, entitled "An act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes." The first section provides:

"That when in any State or Territory, or in any portion of any State or Territory, by reason of insurrection or rebellion, the civil authority of the Government of the United States is obstructed so that the provisions of the act entitled 'An act to provide increased revenue from imports, to pay interest on the public debt, and for other purposes,' approved August 5, 1861, for assessing, levying, and collecting the direct taxes therein mentioned, cannot be peaceably executed, the said direct taxes, by said act apportioned among the several States and Territories, respectively, shall be apportioned and charged in each State and Territory, or part thereof, wherein the civil authority is thus obstructed, upon all the lands and lots of ground situate therein, respectively."

It then provides that each tract of land in those States—not Territories—shall be liable for its proportion of the tax, and commissioners are to be appointed to collect the tax as fast as our armies make their progress. Just as the insurrection is quelled, whether it be in whole or in part, in any one State, the operation of the law commences through the civil means furnished by the laws; and in the interim, to guard against the contingency that there may be sales of the lands, which it may be necessary to the Government to dispose of in order to realize the tax, the law provides that the amount of the tax apportioned by the act of 1861 shall be considered as a lien upon all the land in these very States, as States, which the honorable member from Wisconsin would have us believe, as no doubt he believes, are now out of the Union, and not States at all. Did he not vote for the act of 1862? I have no doubt he did. Was there any member of this body who called in question the right of Congress to pass that act? And yet the act assumes —and there is no power to pass it except on the correctness of that assumption—that they are still States bound to pay their proportion of the taxes for the support of the Government and to carry on the war, and will be States when the insurrection is suppressed.

I refer to these two acts, and there are a great many others that I might cite with the same view, for the purpose of proving that, in the view of Congress, and in the view of the honorable member from Wisconsin himself at the time he gave his assent to these two acts, the States were in and not out of the Union, were living and not dead States, or States that could die. But this fact is further established by the very first act that was passed for the purpose of carrying on the war, the act of July 13, 1861, entitled "An act further to provide for the collection of duties on imports, and for other purposes." It provides that where the President finds it impossible to collect the revenue from imports in the ports of any of the States in insurrection, he may do it elsewhere—in some locality in the particular State where the insurrection does not extend; or, if the insurrection is commensurate with the entire State, then he is to collect it on shipboard, or to close the ports of such State, and to subject any foreign vessel attempting to enter such a port, after notice of its having been closed by the President under authority of the act, to condemnation as prize of war. These provisions are absolutely inconsistent with the idea of the honorable member from Wisconsin, as I think; but there is something else in that act that is even more inconsistent. What view did Congress take of the character of the insurrection at the time it passed the act of July 13, 1861? The language of the fifth section of that act is:

"That whenever the President, in pursuance of the provisions of the second section of the act entitled 'An act to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions, and to repeal the act now in

force for that purpose,' approved February 28, 1795, shall have called forth the militia to suppress combinations against the laws of the United States, and to cause the laws to be duly executed, and the insurgents shall have failed to disperse by the time directed by the President, and when said insurgents claim to act under the authority of any State or States, and such claim is not disclaimed or repudiated by the persons exercising the functions of government in such State or States, or in the part or parts thereof in which said combination exists. nor such insurrection suppressed by said State or States, then and in such case"—

That is, the case of an insurrection existing and not suppressed—

"it may and shall be lawful for the President, by proclamation, to declare that the inhabitants of such State, or any section or part thereof, where such insurrection exists, are in a state of insurrection against the United States; and thereupon all commercial intercourse by and between the same and the citizens thereof and the citizens of the rest of the United States shall cease and be unlawful."

How long? Till Congress shall legislate? No, Mr. President; but "shall cease and be unlawful so long as such condition of hostility shall continue;" in other words, as long as the insurrection continues. That ended, the use of the militia and the use of the Army of the United States to bring about that end is to terminate.

And what said the President of the United States? I am not aware that any member of the Senate questioned the legality of any proclamation issued by President Lincoln on this subject, or questioned either whether he had not gone to the whole extent of the power devolved upon him by the section of the act of 1861 which I have just quoted. And what did he proclaim? His proclamation of April 15, 1861, began thus:

"Whereas the laws of the United States have been for some time past and now are opposed and the execution thereof obstructed in the *States* of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, and Texas, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by law."

In his proclamation of April 19, 1861, he recites:

"Whereas an insurrection against the Government of the United States has broken out in the States of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, and Texas, and the laws of the United States for the collection of the revenue cannot be effectually executed therein conformable to that provision of the Constitution which requires duties to be uniform throughout the United States; and whereas a combination of persons, engaged in such insurrection, have threatened to grant pretended letters of marque to authorize the bearers thereof to commit assaults on the lives, vessels, and property of good citizens of the country lawfully engaged in commerce on the high seas, and in waters of the United States; and whereas an executive proclamation has been already issued, requiring the persons engaged in these disorderly proceedings to desist therefrom, calling out a militia force for the purpose of repressing the same, and convening Congress in extraordinary session to deliberate and determine thereon:

"Now, therefore, I, Abraham Lincoln, President of the United States, with a view to the same purposes before mentioned, and to the protection of the public peace, and the lives and property of quiet and orderly citizens pursuing their lawful occupations, until Congress shall have assembled and deliberated on the said unlawful proceedings, or until the same shall have ceased, have further deemed it advisable to set on foot a blockade of the ports within the *States* aforesaid, in pursuance of the laws of the United States and of the law of nations in such case provided."

In the proclamation of April 27, 1861, he announces that, by the previous proclamation of the 19th, a blockade of the ports of certain States was ordered to be established, and adds:

"And whereas since that date public property of the United States has been seized, the collection of the revenue obstructed, and duly commissioned officers of the United States while engaged in executing the orders of their superiors have been arrested and held in custody as prisoners, or have been impeded in the discharge of their official duties without due legal process by persons claiming to act under authorities of the *States* of Virginia and North Carolina:

"An efficient blockade of the ports of those *States* will also be established."

In the proclamation of August 12, 1861, he states that a joint committee of both Houses of Congress had requested him to recommend a day of public humiliation, fasting, and prayer, and he proceeds to do so, and to state the objects for which prayer should be offered, namely, "for the reëstablishment of law, order, and peace throughout the whole extent of our country."

You authorize him to invoke, and he invokes the merciful interference of Heaven to make us again what we were before—States united under one form of Government, with the same powers adequate to make us a nation prosperous and powerful. You tell him to go to Heaven's throne and implore Heaven's interposition to restore us to the condition in which we were before the rebellion, to pray that "our arms may, be blessed and made effectual for the re-establishment of law, order, and peace throughout the wide extent of our country." No invocation to bless only a part of our land and leave the other out of His benediction.

You tell him to issue a proclamation invoking the blessings of God upon the entire country, not for the purpose merely of bringing about individual happiness, but for the purpose of bringing about what existed before under the Constitution of the United States—peace and order, a recognition of the authority of the Gov-

ernment and of the authority of the laws. Yet, according to the theory of the honorable member from Wisconsin, at that very time the work had been accomplished which the proclamation sought to prevent. The proclamation, pursuing your own authority, prays God to make our arms successful to the end of restoring peace and order everywhere in all the States. The honorable member's theory is that there was a large portion of the country, territorially including what were eleven States before, which cannot be restored by any blessings on the arms of the United States. Whether they were ever to have the benefit of the Constitution, or when they were to have it, or to what extent they were to have it, according to his theory, is to depend upon the discretion of Congress.

Again, what has the Government done with your knowledge? Have they not, just as we have succeeded in getting the authority of the United States reinstated in the ports of the United States, or territorially within the States, extended the revenue laws? Do you not collect duties in New Orleans, in Charleston, in Savannah, in Texas? How do you do this? Under what authority? Under the authority of antecedent laws, which give it only in relation to the ports of States; and yet, according to the honorable member's doctrine, all those ports were not ports of States of this Union at the time when the Executive, with the knowledge of Congress and his individual knowledge, undertook to collect duties and to enforce the execution of the impost acts and acts for the collection of internal revenue. What was the subject of the debate this morning? The honorable member from Massachusetts, who, I believe, was the first to broach in the Senate the doctrine that the States were extinct—a doctrine not then received, as I remember, with unanimous approbation by this body as far as any opinion was expressed on the subject—that honorable gentleman himself, this morning, finding fault as he thought was his duty, with the manner in which the Secretary of the Treasury was discharging his duty of collecting the revenue in the States in which the insurrection did prevail, found no fault with his attempt to collect the revenue. It was only as to the manner of collecting; it was his failure to administer the oath to the assessors whom he has appointed for that purpose. He recognizes, therefore, the duty of the Secretary to collect revenue in South Carolina and in Louisiana? Why? Under what laws? Laws passed by you extending the revenue system to the Territories of the United States, or laws having no force whatever in that particular, except upon the theory that the States, notwithstanding the insurrection, remained and were States of the Union? You are selling lands there now on that theory; I suppose I am guilty of no want of propriety in saying that that subject has been in part before the Committee on the Judiciary. General Sherman, by an order passed after he reached Georgia and South Carolina, set apart a large portion of the territory of those two States for the freedmen. By the order, the most valuable portion of South Carolina was embraced—that portion in which the Sea Island cotton is made. There are no such lands there now to be acted on by that order. Why? Because you have sold them to meet South Carolina's proportion of the direct tax; you have sold them to meet the proportion due by the individual citizens of that State to whom they belonged. Where did you get that authority? Under the antecedent law; and that law was passed on the theory that the States were still in and could not be got out; and that law is now being executed upon the theory that they are in, that each State, as well as every individual member of each State, is just as responsible to pay the tax which the Government may from time to time impose, as he or it was before the insurrection commenced.

But that is not all. The Senate, and I suppose my friend from Wisconsin acted with the rest of the Senate in that respect, has confirmed nominations of judges and district attorneys and marshals for these very States.

Mr. FESSENDEN. For certain "districts."

Mr. JOHNSON. Districts of the States. They are all out according to the theory.

Mr. FESSENDEN. But the districts may exist.

Mr. JOHNSON. I know; but then I suppose if you appoint district judges in all the districts which may be within a State it is the same as appointing them for the State itself. Still, you extend the judiciary system of the United States to these States in part or in whole; that my friend from Maine will of course admit. Under what authority? Under the authority of your antecedent legislation. The Constitution of the United States creates no courts, no marshals, no district attorneys: that is done by legislation; and you legislated upon the subject of constituting courts and bringing into existence the particular officers and making it the duty of the Executive to appoint whenever a vacancy from any cause should exist. What right has a district judge in South Carolina—I believe there is but one district in that State—to hold his office? What authority had you to confer it? If South Carolina was a Territory, then, as the Supreme Court have decided in the case of Canter *vs.* The American Insurance Company, the judicial system of the United States did not extend to it. The territorial judges may be appointed for a time. The judicial tenure which the framers of the Constitution were so anxious to make permanent, so as to make the incumbents independent of legislative or executive control or influence, is not considered as applying to courts that may be created by Congress within the Territories, and the judges of those courts may therefore, it is said, be dismissed at any time.

Such has, in fact, been the practice of the Government. They may be appointed for a term of years, and dismissed as any other civil officer of the Government by the Executive. Does my honorable friend from Wisconsin suppose that the judges in those insurrectionary States can be dismissed? Will he for a moment maintain that their tenure is not an independent one, that they do not hold office during good behavior? I presume not; and if not, why not? Because they constitute a part of the judiciary of the United States as created by the Constitution, and are no such part of the judicial system of the United States in those States except upon the theory that those States are now States of the Union.

Further, you have done more than this. You passed an act some two or three years ago creating an additional judicial circuit, making Oregon and California the tenth circuit of the United States. The act of 1802 (I have not time to turn to it) makes it the duty of the judges of the Supreme Court whenever any chief justice shall thereafter be appointed or any associate justice, to make an allotment of circuits. What has been done (and you are presumed to have known what was done) by the members of the Supreme Court, and who, too, it may be supposed, have some reasonably correct view of the Constitution of the United States? Here is an order passed by them at their session of December term, 1862:

"There having been"—

says the order—I read from it—

"two associate justices of this court appointed since its last session, it is

"*Ordered*, That the following allotment be made of the Chief Justice and associate justices of said court among the circuits, agreeably to the act of Congress in such cases made and provided"—

That is, the act of 1802—

"and that such allotment be entered of record, to wit: for the first circuit, Nathan Clifford; for the second circuit, Samuel Nelson; for the third circuit, Robert C. Grier; for the fourth circuit, Roger B. Taney; for the fifth circuit, James M. Wayne; for the sixth circuit, John Catron; for the seventh circuit, Noah H. Swayne; for the eighth circuit, David Davis; for the ninth circuit, Samuel F. Miller; for the tenth circuit, Stephen J. Field."

Do you know what States are in these several circuits? I suppose some of the Senators do not. Bear in mind the exact dimensions of these several circuits. The fourth circuit contains Delaware, Maryland, Virginia, North Carolina, and West Virginia. By that order the then Chief Justice was allotted to that circuit. No two States were then more absolutely in rebellion than Virginia and North Carolina. The fifth circuit consists of South Carolina, Georgia, Alabama, Mississippi, and Florida, every one in a state of insurrection, and to that Mr. Justice Wayne was allotted. The sixth circuit consists of Louisiana, Texas, Arkansas, Kentucky, and Tennessee; all except Kentucky at that time in rebellion. To that the late Justice Catron was allotted.

The late Chief Justice afterward died, and the present chief was appointed. The contingency again arose when it was necessary to make a new allotment, and that Chief Justice himself takes part in that allotment. Does he consider these States as at an end? An order passed by the court at the session of December, 1865, by which the fourth circuit, consisting of Maryland, Virginia, North Carolina, and West Virginia, was allotted to Chief Justice Salmon P. Chase; the fifth circuit, consisting of South Carolina, Georgia, Alabama, Mississippi, and Florida, all lately in insurrection, was allotted to Mr. Justice Wayne. The sixth circuit is now vacant, no successor having been appointed to Mr. Justice Catron.

Thus the Senate see that the judges of the Supreme Court by a unanimous order passed in the execution of the statute of 1802, the contingency having occurred which rendered it necessary that they should discharge the duty imposed upon them, have thought themselves bound to consider all of these States as still States of the Union, and have, as among themselves, divided out these States as composing the circuits to which the respective judges are to be allotted.

Mr. President, it would be fatiguing the Senate, however it may be desirable, perhaps, in order that the country may be informed, to refer to all the proceedings of the Legislature and the Executive and the Judiciary to show that in the opinion of each department these States are considered as existing States, and in the Union as such. All that I further propose to do on this occasion is to call the attention of the Senate to a passage or two in the opinion of the Supreme Court in the prize cases, and to some general remarks as to the authority of the United States to bring about the end which the honorable member supposes has been brought about by the hostilities or in consequence of the hostilities.

A passage in the opinion of the court in those cases has been over and over again relied upon in this Chamber and elsewhere as maintaining the doctrine that whatever may be accomplished by war in the case of an international war, has been accomplished by means of the hostilities which we have been carrying on in these States, and consequently that whatever rights are incident to a state of war, and may be acquired by either of the belligerents in an international war, are incident to and might be acquired by the United States in the hostilities which the United States has carried on; and that as one of those rights is to obtain title by conquest that title may be obtained in our case by the United States as well as if the war had

been an international one. Now, before I take up the case, permit me to change the order in which I propose to consider it, and let me state the proposition so that I may very fairly try conclusions with my friend from Wisconsin.

Supposing him to maintain the doctrine which I am about to state, (he does it, as I think, necessarily, as one of the results of his view, if he does not do it in terms,) we have obtained, says the honorable member, as one of the consequences of the war, some right that we had not before. What is that? A right to legislate for the people and for the territory within the States that have been in insurrection as people of Territories and as Territories. We have got that how? By the result of the war. What result of the war? Because of the victory which we have achieved over the rebellion. We have won it by force of arms; we are the conquerors, they are the conquered. We, therefore, by virtue of the conquest, have a right over the territory of these States which we did not before possess. We have an authority over the citizens of those States which we did not before possess. Conquered! In the first place we are to consider what authority is there in the Constitution of the United States which gives to the General Government—if there shall be enough left of that Government to accomplish it—the right to conquer the States. I have, in a measure anticipated the argument. The authority delegated is an authority not to conquer people or territory, but to conquer in the name of the Constitution and laws of the United States, and thereby, by force of such conquest, to be able to hold them up and declare to the insurgents, "This is your Constitution and your laws, and you are bound by them as you were before you attempted to resist their authority."

Can anybody doubt that? We went into the conflict to maintain both the Constitution and the laws. What gave rise to the conflict? What was the conflict? Are the States and the people of the States in or out of the Union? We have tried that question by ordeal of battle. What has been the result? Have the insurgents succeeded, or have we succeeded? They wanted to get out of the Union; we wanted to retain them in the Union. That was the issue between us. We said that, notwithstanding their acts of secession and hostility, they were still States, and their citizens were bound to obey the Constitution and laws of the United States. They said they were not States of the Union, and that their citizens were not bound by the Constitution and laws of the Union. The struggle has been made, the issue has been tried, the verdict has been rendered, and it is in our favor. Success is ours. Well, success how? Succeeded to what extent? Succeeded in keeping in the Union men who were endeavoring by force of arms to escape from the Union.

The proposition of the honorable member is that we have succeeded only in part; we have put down the insurrection, but we have lost the States to retain which was our object in carrying on the conflict. If so, it can be hardly called a victory at all. Preservation was the purpose; preservation was the duty; the countless lives that have been lost, and the still more countless treasure that has been expended, have served, to be sure, the purpose of putting down forcible resistance to the execution of the Constitution and the laws, but leave the Union a Union only of some twenty-one States instead of thirty-three or thirty-four. The victory, according to that theory, is but half achieved; the object is but half accomplished. We wanted to bring them where they were when they started. They said they would not return to where they were when they started. We have put it out of their power to take themselves out of the Union individually, but we have not been able to retain the States. They are hopelessly, absolutely gone, according to the theory of the honorable member. Can that be so, Mr. President? Is it possible that it can be so? If it be, I am by no means prepared to say that the object accomplished compensates at all for the sacrifices which have been made to accomplish it—a dissevered Union, brought about, not by our consent; we protested against it; but if the honorable member is right in his theory, brought about because we could not prevent it. Practically, he comes to the same conclusion that the former President of the United States came to, as announced in the message which he sent to Congress announcing the existence of the insurrection, that there was no right to secede, but that there was no authority in the Government to prevent it. It makes very little difference whether the want of authority is acknowledged as a want apparent in the Constitution, or whether it is maintained as a fact which cannot be avoided if the insurgents think proper to carry on the war for any length of time—not to be avoided if they pursue a certain course of conduct. Now, Mr. President, what difference in principle does it make as far as concerns the question which I am now discussing, whether there are twenty-one States resolved upon standing by the Government and eleven only in hostility against it, or whether there be eleven who stand by it and twenty-one against it, and the eleven succeed?

Massachusetts and Virginia, perhaps, at one period in the history of the Government, might by uniting their forces have escaped the obligations of the Union. The States upon whose shoulders rested for support the arms of Washington, during the revolutionary struggle, were then all-powerful; and one of those States would have been perhaps the most powerful State now in the Union but for the existence of involuntary servitude. I mean Virginia. If the remaining States had thought proper to resist it, those two States might by their physical power

and patriotism have put down the insurrection; and, according to the theory of the honorable member, then the Union, which our fathers thought consisted of thirteen States, the States that had carried us successfully through the revolutionary struggle, would be reduced to two. What sort of a Congress would you have? Two Senators from Massachusetts and two Senators from Virginia, and a larger number in the other House. Do you think that would be a constitutional condition of things?

Mr. HOWE. What is the clause of the Constitution which condemns it?

Mr. JOHNSON. Condemns what?

Mr. HOWE. Condemns that state of things in the case supposed.

Mr. JOHNSON. There is no particular clause condemning it, because, I was about to say, no man in the Convention ever thought that such a proposition would be contended for.

Mr. HOWE. I presume not.

Mr. JOHNSON. It is not provided against in express terms, but it is provided against by the whole spirit of the Constitution. The Government formed by the Constitution cannot exist unless the States are represented. The theory of the honorable member would, in the case I have supposed, constitute Virginia and Massachusetts despots, armed with the power of doing whatever they might think proper toward the other States or the citizens within those States.

But again the honorable member says that conquest extinguishes these States, or that what has been done extinguishes them. Does the honorable member recollect what the decision of the Supreme Court was in the case of the United States *vs.* Rice, reported in 4 Wheaton? I have no doubt his memory can easily be refreshed when I call his attention to the case. The honorable member told us yesterday that he could not imagine a State suspended that could be revived without some congressional legislation. Suspension in such a case, according to him, is death. The case to which I allude presented this question: during the war of 1812, sometime in 1814, the British obtained the undisputed possession of Castine and of the territory of Maine lying on the other side, a territory, I believe, constituting about one third of that State. From the time they got possession up to the ratification of the treaty of peace of February, 1815, they had undisputed possession; the authority of the United States was gone for a time; the authority of Maine was gone for a time. Is that part of the State of Maine out of the Union now? I do not think my friend whom I see, one of the Senators from the State of Maine, would admit that. I rather presume that he thinks that Castine is a part of the State of Maine, and he thinks that all the rest of the territory of that State that came into the actual physical possession, by force of arms, of Great Britain in 1814, and remained there until the ratification of peace in 1815, still is a part of the State of Maine. But what was it in the interval? Dead, if my friend from Wisconsin is right now as to the effect of State suspension; dead, because the authority of the State and the authority of the United States during the whole of that period was suspended. This is not my own word; it is the word of the Supreme Court itself. The decision arose out of this state of facts: while the port was in the exclusive military possession of England a cargo was imported, and England imposed, herself, upon the cargo whatever duties she thought proper to exact. The cargo was landed, the English duty paid. The authority of the United States afterward was reinstated. The collector of the United States insisted upon the importer paying the duty which the cargo would have been liable to under the laws of the United States if Castine had been in the possession of the United States at the time of the importation, and he made him give a bond for the payment of such duty. The case was tried, and the Supreme Court by a unanimous decision decided that the bond was void. Now, how came they to decide so? I will read a few sentences from the opinion of Mr. Justice Story, in 4 Wheaton, page 253. He says:

"The single question arising on the pleadings in this case is, whether goods imported into Castine during its occupation by the enemy are liable to the duties imposed by the revenue laws upon goods imported into the United States. It appears, by the pleadings, that on the 1st day of September, 1814, Castine was captured by the enemy, and remained in his exclusive possession, under the command and control of his military and naval forces, until after the ratification of the treaty of peace, in February, 1815. During this period the British Government exercised all civil and military authority over the place, and established a custom-house, and admitted goods to be imported, according to regulations prescribed by itself, and, among others, admitted the goods upon which duties are now demanded. These goods remained at Castine until after it was evacuated by the enemy; and upon the reëstablishment of the American Government the collector of the customs, claiming a right to American duties on the goods, took the bond in question from the defendant for the security of them.

"Under these circumstances, we are all of opinion that the claim for duties cannot be sustained. By the conquest and military occupation of Castine the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place."

That is, as long as it continued. Now he goes on to say how long it continued:

"The sovereignty of the United States over the territory was of course suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors."

* * * * * * * * * *

"The subsequent evacuation by the enemy, and re-

sumption of authority by the United States, did not, and could not, change the character of the previous transaction."

Did anybody suggest that before the authority of the United States, after the British evacuated Castine, could be reinstated it was necessary for Congress to legislate? Did anybody suggest that the suspension of the authority of the United States during the period of the possession of Castine by the enemy operated to put an end to the authority of the United States, and so completely that it could not be reëstablished except by subsequent legislation? Unquestionably not. The moment the place was abandoned the authority of the United States became reinstated *proprio vigore*.

Now, to apply it to the case under consideration, the effect of the occupation of Castine was, according to the language of the court, to suspend the Constitution and laws, and the authority of both, within the limits of that possession. The possession terminates, and the court say that upon the termination of that military exclusive possession the authority of the United States is revived at once without any legislation. It never occurred to the court or to anybody else, and my friend will look in vain at the statute-book for the purpose of showing that there was any legislation extending again the revenue laws of the United States to the port of Castine. It revived just as animal life revives in certain cases after temporary suspension.

Suspension, then, according to the doctrine of the Supreme Court, is not what the honorable member from Wisconsin supposes suspension to be; it is not death: it is temporary paralysis of which the cure becomes absolute and effectual by removing the cause of that temporary paralysis, and that ended, the States stand as they stood before the disease assailed them: they stand perfect, with all the health of living and vital and powerful States, and entitled to the benefits of the Constitution and the laws, for the same reason that the people of Castine and that part of the territory of Maine which was held for a time by the armies of England became at once by the termination of that possession reinstated in all the rights which belonged to Castine and that part of Maine before its possession by the enemy.

We hear of the right of conquest. What is to be conquered? Only what you have a right to demand. And what have you in such a case as this a right to demand? Submission to the authority of the Government, and that you have got. To maintain that, under the authority to enforce by force of arms submission to the authority of the Government you can destroy the States, is to say that Government can accomplish that by arms which it has no right to raise an arm to accomplish.

There are many other observations, Mr. President, with which I might trouble the Senate, and may perhaps do so at some future day and on some other question; but I have said as much and more than I intended when I rose. I conclude, therefore, with saying and with hoping, as I think every patriotic man in the country does hope, that our ancient harmony will be restored; that our ancient Union of States, as they existed when the insurrection commenced, will be reinstated; that we shall forgive and try to forget the horrors through which we have passed during the last five years; that we shall come together as a band of brothers, and present to the nations of the world a Government in which there is an actual union of obligation and of hearts sufficient to protect us against foreign foes, powerful enough and willing and resolved to guard against all perils to its continuing existence arising from insurrection at home, and capable of making us one of the freest and most prosperous and most renowned nations upon the face of the earth.